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Recovery for Mental Harm Under Article 17 of the Warsaw Convention: An Interpretation of *Lésion Corporelle*

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I. INTRODUCTION

As international relations become increasingly important, the role of treaties as legal instruments regulating those relations has become vital. One of the most controversial, difficult, and recurring problems with treaties is how to interpret them. This problem is aggravated by the fact that international treaties are usually drawn up in several languages, and the various multilingual versions frequently convey different nuances. The sources of these discrepancies range from drafting and translation errors to difficulties arising from fundamental differences between the theories of jurisprudence underlying different legal systems. Moreover, certain expressions simply defy translation or require a particular choice of words, making parity of language virtually impossible.

In light of these problems, numerous rules have been developed to aid in the interpretation of multilingual treaties. These rules depend in part on the authoritativeness of a particular version. Thus, while it appears that no interpretation question would arise when a treaty is written in a single authoritative version, this is often not the case. When the original version has not been adopted as the official version and a term of the official version is in controversy, the issue arises whether rules of treaty interpretation permit resort to the original version as a supplemental means of interpretation.

This problem is well illustrated by cases involving the interpretation of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention).[1] The Warsaw Convention comes into play in virtually every lawsuit involving interna-

* The author gratefully acknowledges the invaluable guidance of Professor Rudolf B. Schlesinger.

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* Oct. 29, 1934, 49 Stat. 3000-26 (1935-1936).

tional air traffic accidents, lost baggage, or hijacking. It is obviously "not a treaty that has mouldered on the books."[2] Although the original version is in French, United States courts have used an official translation in English that has never been adopted by the parties to the Warsaw Convention. As to the propriety of this use, two schools of thought have emerged. The first essentially advocates the French legal meaning as binding. The second gives effect to the common-law meaning of the terms translated into English.

The first section of this Note discusses the sources of treaty interpretation problems and the various approaches that have been advanced as solutions. It will set forth the general rules of treaty interpretation under the Restatement of Foreign Relations Law of the United States and the Vienna Convention. Next, the Note will analyze the purpose and intent of the framers of the Warsaw Convention and its particular linguistic stance. The following sections examine a line of judicial decisions that have used the rules of treaty interpretation in interpreting Article 17 of the Warsaw Convention. Article 17 allows recovery for "wounding" or "bodily injury."[3] The issue in each of these cases is whether Article 17 provides recovery for emotional distress absent some physical cause or manifestation. The decisions adopt several interpretative approaches, reaching differing results. This Note will make a determination as to the extent to which each of the decisions complies with the rules of treaty interpretation. Arguments will be presented in support of the line of decisions which advocate that the French legal meaning is binding and which liberally allow resort to means of interpretation extraneous to the text of the Convention. The Note concludes that the approach which utilizes the French legal meaning is doctrinally correct and should guide future interpretations of the Warsaw Convention.

2. Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977).

3. Article 17 of the Warsaw Convention provides in relevant part: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by the passenger. . . ." 49 Stat. 3000, 3018 (1935-1936).

The original French version is: *"le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle. . . ."* *Id.* at 3005. Adopting the position that the French legal meaning should be considered binding, the Note will focus on whether the term *"lésion corporelle"* (bodily injury) allows for recovery for mental harm absent a physical impact or consequence.

II. SOURCES OF PROBLEMS IN THE INTERPRETATION OF INTERNATIONAL TREATIES

Even in a monolingual situation it has been said that "true communication is only possible among those who think alike."[4] Transposing the difficulties of person-to-person communication onto a nation-to-nation scale brings with it an increased potential for misinterpretation. This is necessarily so because each language through its peculiar structure embodies a world outlook which differs from that of any other language.[5] Few translations can take an idea originally expressed in one language and transfer it to another without changing it.[6] In effect, a translation is an interpretation subject to a number of variables such as the nature of the text, the skill of the translator, and the translator's subjective understanding of the material.

Problems with the interpretation of international treaties arise on three different levels. First, certain divergences may occur on a purely linguistic level. For example, homonyms present traps,[7] for even when the principal meaning coincides in both the source language and the target language, there still may be a second, unexpected connotation in one language.[8] Second, the purely philological problem of translating ideas from one language into another is further complicated when concepts from one legal system are being translated into another.[9] The difficulty

4. E. FORSTHOFF, RECHT UND SPRACHE 11 (1940), *cited* in M. HILF, *infra* note 6, at 21. This attitude of "semantic scepticism" is shared by Judge Jerome Frank. *See* Frank, *Civil Law Influences on the Common Law?: Some Reflections on "Comparative" and "Contrastive" Law,* 104 U. PA. L. REV. 887, 917-19 (1956).

5. Frank, *supra* note 4, at 919.

6. An experienced court interpreter observes: "Languages are not congruent. Translating is therefore always difficult, usually more difficult than to express oneself directly in a foreign language." Werner, *Linguistic-Judicial Remarks on Decisions in Restitution Matters,* 1954 JURISTISCHE RUNDSCHAU 168. *See also* M. HILF, AUSLEGUNG MEHRSPRACHIGER VERTRÄGE 22 (1973).

7. For example, the French *contrat, domicile, tribunal administratif, notaire, prescription,* and *juge de paix* are not the equivalents of the English contract, domicile, administrative tribunal, notary, prescription, and justice of the peace. A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 11 (1974). Such homonyms are also termed "false equivalents" *(faux équivalents).* R. MANKIEWICZ, MÉLANGES EN L'HONNEUR DE PAUL ROUBIER 105 (1961).

8. E.g., the French word *lésion* is commonly translated as injury but it may also mean damage, wounding, or infringement of a right. Mankiewicz, *The Application of Article 17 of the Warsaw Convention to Mental Suffering Not Related to Physical Injury,* 4 ANNALS AIR & SPACE L. 187, 197 (1979).

9. This type of problem was illustrated by Hilf, who noted that it would be very difficult for somebody trained in common law to understand the concept of *force majeure* or *dol.* M. HILF, *supra* note 6, at 24. On the other hand, proximate cause and *res ipsa loquitur* are legal

occurs because the rule of law or concept to be translated may either have an entirely different technical connotation or be altogether nonexistent in the target language.[10] A translation of a foreign legal text is in itself an exercise in comparative law.[11] Therefore, the knowledge of a foreign language required for legal translation is often much greater than the knowledge necessary for nonlegal translation.[12]

Finally, a particular type of interpretation problem inherent in international treaties is vagueness. Treaties are based on many individual compromises, yet the far-reaching political implications inherent in these compromises are often left unresolved through the use of vague terms.[13] The greater the number of participants to the treaty, the less likely it is that a perfect linguistic formulation will be reached. Therefore, frequently drafters will broadly formulate a treaty and deliberately introduce vague concepts and wide-ranging doctrines so as to invite future interpretation.[14] These semantic manipulations[15] allow for the extension of international treaties to previously unregulated areas.

In view of the enumerated problems, a proper translation of international treaties should involve two stages of analysis. First, the literal, nontechnical meaning of each term must be established. Second, the legal meaning of each term must be ascertained through study of cases, commentaries, and other embodiments of the law in the target language.[16] Even after an adequate translation has been made, issues of interpretation may arise. Interpretative problems are often complicated by the different levels of authoritativeness given various versions of the treaty. An additional complication is the absence of an internationally established body of law in the area of treaty interpretation.

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concepts which are hard to explain to civilians. On the danger of transplanting concepts, see, e.g., Frank, *supra* note 4, at 919-20.

10. *See* Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Regime Linguistique in the Court of Justice of the European Communities*, 62 NW. U.L. REV. 701, 715 (1967).

11. M. HILF, *supra* note 6, at 22-23.

12. An additional refinement can be made here based on the purpose of the translation. A translation may be satisfactory merely for information purposes, but "inadequate and even harmful in an adversary proceeding conducted with the animus of skilled advocacy." De Vries, *Choice of Language*, 3 VA. J. INT'L L. 26, 32 (1963).

13. Stevens, *supra* note 10, at 720.

14. *Id.* at 721.

15. Bueckling, *The Strategy of Semantics and the Making Provisions of the Space Treaty*, 7 J. SPACE L. 15, 16 (1979).

16. R. SCHLESINGER, COMPARATIVE LAW: CASES—TEXTS—MATERIALS 819 (4th ed. 1980).

III. AUTHORITATIVENESS OF TREATY TEXTS

There are three types of texts used in the interpretation of international treaties: authentic versions,[17] official texts,[18] and official translations.[19] These texts represent three progressively decreasing levels of authoritativeness.[20] Since a more authoritative text automatically prevails over a less authoritative one, the question arises whether an official translation has any interpretative value and if so, what its status is as compared with the other types of text.

Unlike the authentic and official texts, official translations are not an integral part of the treaty.[21] They are usually prepared by a contracting party, state or international body for its own use.[22] Official translations are often prepared some time after the treaty has been signed. While this fact does not necessarily reflect on the quality of the version, it must be kept in mind that official translations are unilaterally prepared documents[23] which have not been negotiated by the parties to the treaty.[24] Consequently, when using official translations certain caution is required in view of the potential difficulties outlined above.[25]

Despite these limitations, official translations are used in two ways. The first use is as a basic instrument. Frequently, domestic courts dealing with international treaties will resort to whatever translation of the treaty is available in their national language. This approach, although not in accordance with the general hierarchy of authoritativeness, has been considered acceptable for purposes of expediency in view of linguis-

17. M. TABORY, MULTILINGUALISM IN INTERNATIONAL LAW AND INSTITUTIONS 37 (1980). For interpretative purposes, authentic texts are binding.

18. *Id.* Official texts, although signed by the negotiating states, are not accepted as authoritative.

19. *Id.* Official translations are prepared by the parties, individual governments, or international organizations.

20. Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 BRIT. Y.B. OF INT'L L. 72, 123 (1961).

21. *Id.* at 136.

22. *Id.*

23. M. HILF, *supra* note 6, at 106. *See also* Germer, *Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on Law of Treaties*, 11 HARV. INT'L L.J. 400, 407 (1970); Ivrakis, *Official Translations of International Instruments Documents; Practice of the ILO, the LN and the UN*, REVUE HELLENIQUE DE DROIT INTERNATIONAL 217, 247 (1955).

24. In certain situations translations are generated concomitant with the drafting of the original text, though not authenticated by the parties. In this case there seems to be no question that the translation is part of the legislative history and may properly be consulted for clarification of the original. Dölle, *Mehrsprachige Gesetzes- und Vertragstexte*, 26 RABELS ZEITSCHRIFT 4, 24 (1961).

25. *See supra* text accompanying notes 4-14.

tic difficulties.[26] One rationale advanced by the school which advocates an official translation of a treaty as binding is that justice requires that nationals have access to the text that underlies their courts' interpretation.[27]

The second use of official translations is as a supplementary means of interpretation. When the authentic or official texts are ambiguous or reveal discrepancies, official translations are often used for guidance in ascertaining the drafters' intent.[28] The rationale behind this use is that at least one party to the treaty understood the meaning as it appeared in the official translation. Many authors, however, deny the interpretative value of official translations in this situation.[29] They argue that a translation into the national language of the user country, not agreed upon by the parties, has no effect when it conflicts with an authentic text in the original language.[30] While international courts usually adhere to the authentic version, the situation in domestic courts is often different. The judge may be bound by municipal law to apply official translations exclusively,[31] or he may have the discretion to either totally reject national translations or use them as a subsidiary means of interpretation. The authoritativeness of official translations in domestic courts has been considered solely a matter of municipal law.[32] However, such a view makes it virtually impossible to maintain any uniform international law.

A related issue is whether the original version, being the most authoritative, should be consulted automatically whenever its provisions apply, even though no discrepancies between the original version and the official translation are noticed and none of the parties raises the issue.[33] Theoretically, unless one of the interested parties reveals the existence of a discrepancy, the tribunal may find itself interpreting an official translation on the faulty assumption that it accurately reflects the meaning of the original version of a treaty.[34] Thus, a country relying only upon its official translation of a multilingual treaty should be aware that its conduct may in fact be violating the terms of the treaty.[35] On the other

26. M. HILF, *supra* note 6, at 221-22.

27. Dölle, *supra* note 24, at 32.

28. M. HILF, *supra* note 6, at 107.

29. Hardy, *supra* note 20, at 137; *see also* M. HILF, *supra* note 6, at 107.

30. *See supra* note 29; *see also* A. VERDROSS & B. SIMMA, UNIVERSELLES VÖLKERRECHT 397 (1976); Ivrakis, *supra* note 23, at 217.

31. M. HILF, *supra* note 6, at 214-15; *see also* Hardy, *supra* note 20, at 136.

32. Hardy, *supra* note 20, at 138.

33. M. TABORY, *supra* note 17, at 138.

34. *Id.* at 199.

35. M. HILF, *supra* note 6, at 77-80.

hand, it would be cumbersome for courts to be obligated to resort to a foreign language whenever treaty provisions are being interpreted.

IV. RULES OF INTERPRETATION

There are two main schools of thought relating to interpretation of international treaties. One school endorses the textual approach, which considers the text of a treaty alone to be the authentic expression of the parties' intent. The other school adopts the contextual approach, which determines the parties' intent by looking beyond the language of the treaty to other evidence that aids in its interpretation. Such evidence might include the circumstances surrounding formation of the treaty, legislative history, and the *travaux préparatoires*.[36] The following section examines these approaches to treaty interpretation and their application to the Warsaw Convention.

A. The Vienna Convention[37]

International jurisprudence recognizes several principles of treaty interpretation. Those holding the status of universal or general rules of international law have been codified in Articles 31, 32, and 33 of the Vienna Convention, which largely follows the textual approach.[38] Article 31 provides that in most instances treaties should be interpreted considering only the text of the treaty, any supplementary agreements and instruments, subsequent agreements or practices, and the applicable rules of international law.[39] Supplementary means of interpretation are allowed under Article 32 if the interpretation reached under Article 31 either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[40]

Article 33, which concerns multilingual treaties, is the only article

36. M. TABORY, *supra* note 17, at 202; Note, *Air Law—Foreign Language Treaty Interpretation—Recovery of Damages for Mental Injuries in Airplane Hijackings: Rosman v. Trans World Airlines*, INT'L L. & POL. 87, 93-95 (1975) [hereinafter cited as *Rosman* Note]. Certain authors also identify a third, "teleological" approach which focuses on the declared or apparent object of the treaty. *See* Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318 (1969).

37. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, May 23, 1969, *reprinted in* 8 INT'L LEGAL MAT'LS 679 (1969) and 63 AM. J. INT'L L. 875 (1969) [hereinafter cited as Vienna Convention]. For a more detailed listing of the principles that have not been codified in the Vienna Convention, see Hardy, *supra* note 20, *passim*. For their status after the adoption of the Vienna Convention, see M. TABORY, *supra* note 17, at 206-08.

38. *See Rosman* Note, *supra* note 36, at 93.

39. Vienna Convention, *supra* note 37, art. 31.

40. *Id.* art. 32.

that addresses the problem of language in treaty interpretation. It provides that an authentic[41] text is authoritative and it prescribes rules of interpretation when discrepancies arise as to the meaning of different texts. In addition, Article 33.2 provides: "A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree."[42] Article 33 is the only provision in the Vienna Convention which implies that unauthenticated versions of a treaty may have some legal significance. However, Article 33 provides no guidelines as to the interpretation of such versions.

In its deliberations, the International Law Commission did not ignore the significance of official unauthenticated translations. This issue, however, was left unresolved because the Commission could not agree upon a general principle of interpretation that would take into account the multiplicity of situations.[43] Nonetheless, according to certain authors, the Commission's use of the term "version" for an unauthenticated source and "text" for an authentic source[44] suggests that the Commission intended to distinguish between binding and nonbinding texts.[45] In summary, the Vienna Convention provided no particular guidance to the interpretation of a treaty whose sole authoritative version is in a foreign language, when the version in dispute is a mere official translation lacking in interpretative value.

B. The Restatement of Foreign Relations Law

The Restatement of Foreign Relations Law of the United States[46] is another possible source of guidance in the interpretation of official translations of multilingual treaties. The Restatement is a codification of the

41. *Id.* art. 33.

42. *Id.* art. 33, para. 2.

43. M. HILF, *supra* note 6, at 103.

44. Vienna Convention, *supra* note 37, art. 10,

> The text of a treaty is established as authentic and definitive: (a) by such procedure as may be provided for in the text or agreed upon by the states participating in its drawing up; or (b) failing such procedure, by the signature and referendum or initialing by the representatives of those states of the text of the treaty or of the Final Act of a conference incorporating the text.

Id.

45. M. TABORY, *supra* note 17, at 171. *See also* Germer, *supra* note 23, at 408.

46. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as RESTATEMENT]. This was the official version of the Restatement in effect at the time of the decisions discussed in this Note. In 1980 the American Law Institute published a Tentative Revised Draft of the Restatement. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) (Tent. Draft 1982) [hereinafter cited as REVISED RESTATEMENT].

case law and reflects the traditional contextual approach of United States courts.[47] Under the Restatement view,[48] not only is the ordinary meaning of treaty language considered, but the interpreting body should also compare the various original language texts "taking into account any provision in the [Treaty] agreement as to the authoritativeness of the different texts."[49] Although the Restatement view does not specifically address the problem of official translations,[50] it would probably permit the interpreter to examine other sources, such as the authentic version of the treaty. This is consistent with the prevailing view in international law that a court has not only the latitude, but also the obligation, to consult the text of highest authoritativeness.

Under the influence of the Vienna Convention, the Revised Restatement[51] adopts a more textual approach which reflects many countries' unwillingness to reject a literal interpretation of statutes.[52] Under the Revised Restatement, the drafters' intent is to be ascertained from "the terms of the agreement in their context."[53] Section 330 of the Revised Restatement[54] is similar to Article 31 of the Vienna Convention[55] in that it allows supplementary means of interpretation where the result obtained either "leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."[56] Consequently, the guidance furnished by the Restatement is as inconclusive as that provided by the Vienna Convention.

C. Judicial Decisions

Although the United States Supreme Court has not decided a case involving interpretation of the Warsaw Convention, some guidance can be derived from the court's holding in *Todok v. Union State Bank*.[57] The *Todok* case established the principle that when a treaty is drafted in only one language, that language is controlling in the resolution of any disputes arising under the treaty. *Todok* involved the interpretation of a

47. *Rosman* Note, *supra* note 36, at 97-98.

48. RESTATEMENT, *supra* note 46, § 147.

49. *Id.* § 147 (i).

50. *Id.* § 147. Comment (*l*) mentions that no authority has been found dealing with versions in a language not stated in the agreement to be authoritative.

51. REVISED RESTATEMENT, *supra* note 46.

52. *Id.* § 329, Reporter's note 1. "Statutes" in this context also includes treaties.

53. *Id.* § 329.

54. *Id.* § 330.

55. Vienna Convention, *supra* note 37, art. 31.

56. REVISED RESTATEMENT, *supra* note 46, § 330.

57. Todok v. Union State Bank, 281 U.S. 449 (1930).

treaty drafted solely in French. The term *"fonds et biens"* had accurately been translated as "goods and effects." However, the Court inquired beyond this translation and found that the civil-law usage of *"biens"* included real estate, whereas "goods" under United States common law referred only to chattels.[58] Thus the Supreme Court based its interpretation of the treaty on the French legal meaning of a treaty term.

The landmark decision regarding the proper interpretation of the Warsaw Convention is *Block v. Air France*,[59] which involved an airplane crash upon take-off at Orly Airport in Paris. The plaintiff's main contention was that the applicability of the Warsaw Convention to any case was premised on the existence of a contract and that the framers had not envisaged an aircraft charter to be a direct contractual relation between a passenger and an airline.[60]

The Fifth Circuit approached its interpretative task by observing that "the underlying concepts are civilian in origin."[61] The fact that the Convention was drafted exclusively in French[62] was seen by the Fifth Circuit as a clear indication that the drafters intended the French legal meaning to be binding.[63] In order to arrive at the proper interpretation, the court consulted the civil-law meaning of the word "contract" and the minutes of the Convention to determine the legislative intent. The court noted that the civil-law meaning of "contract" differs from the common-law meaning because it does not require mutual consideration. The only elements needed to establish a contract of carriage under civil law are a promise by the carrier to transport the passenger and the passenger's consent.[64] Based on the legislative history of the Warsaw Convention and the court's inquiry into the civil-law use of the controverted terms, the court found that, contrary to *Block*'s contention, a contract had been formed which effectively brought the case within the purview of the Warsaw Convention.

The basic interpretative principles laid down in *Block* have been cited with approval and extensively followed by many United States and

58. *Id.* at 454.

59. Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 329 U.S. 905 (1968).

60. The Warsaw Convention applies on its face only to two party contractual relations. For a general discussion of *Block*, see Note, *Warsaw Convention—A Limited Liability—Voyage Character: Block v. Air France*, 34 J. AIR L. & COM. 643, 644 (1968) [hereinafter cited as *Block* Note].

61. *Block*, 386 F.2d at 331.

62. *Id.* at 330.

63. *Id.*

64. *Id.* at 330-31.

foreign courts.[65] As a general rule, under *Block* the court has an obligation to keep a treaty's interpretation as uniform as possible in accordance with the intent of the framers.[66] In the case of the Warsaw Convention, this harmonizing construction can be attained by giving primacy to the French legal meaning of the treaty's terms,[67] and by considering, when appropriate, the treaty's legislative history and relevant extrinsic aids.[68] A court may also look for guidance to judicial decisions of other countries[69] and consult the additional protocols and amendments,[70] as subsequent actions of the signatories may clarify intent.[71] Both the Restatement[72] and the Vienna Convention[73] support this view.

One example of such subsequent action is the Guatemala City Protocol.[74] In the Protocol, the term "wounding and bodily injury" was

65. Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977); Day v. TWA, 528 F.2d 31 (2d Cir. 1975); Rosman v. TWA, 34 N.Y.2d. 385 (1974); Palagonia v. TWA, 442 N.Y.S.2d 670 (1978); Fothergill v. Monarch Airlines, [1980] 2 All E. R. 696.

66. *Block*, 386 F.2d at 338.

67. *Id.* at 330-32.

68. *Id.* at 335.

69. Husserl v. Swiss Air, 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975) [hereinafter cited as *Husserl* II].

70. The Warsaw Convention has been amended several times. The Montreal Agreement of 1966 requires that passengers be given notice that the Warsaw Convention applies to personal injury rather than merely to "bodily injury." The Montreal Agreement left the French text unchanged. Article 17 of the Warsaw Convention was not similarly modified until the Guatemala City Protocol of 1971. One court has interpreted this change to mean that *lésion corporelle* encompasses nervous shock and mental suffering. See Husserl v. Swiss Air, 351 F. Supp. 702, 707 (S.D.N.Y. 1972) [hereinafter cited as Husserl I].

Although the Guatemala City Protocol has not been ratified by the United States Senate, it is relevant that the United States plenipotentiaries approved and signed the Protocol after having participated in the framing and the drafting of the text. R. MANKIEWICZ, *supra* note 7, at 189-92. Although ratification of such an amendment by the United States would make it part of the Convention and as such the "law of the land," even in instances in which the United States is not a party to the amended version, such action is evidence of the parties' intent.

71. *Id. See, e.g.*, Benjamins v. British European Airways, 572 F.2d 913, 918-19 (2d Cir. 1978) (stating "More compelling is the evidence of how other signatories of the [Warsaw] Convention have interpreted its provisions. . . . [W]e do find the opinions of our sister signatories to be entitled to considerable weight"). *See also Day*, 528 F.2d at 35; Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943).

72. RESTATEMENT, *supra* note 46, § 147. Factors to be considered in the interpretative process include "the subsequent practice of the parties in the performance of the agreement."

73. Vienna Convention, *supra* note 37,

> There shall be taken into account, together with the context (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

Id. Art. 31(3)(b).

74. *See infra* note 83.

substituted by "personal injury," while the French *"lésion corporelle"* was left unchanged. This has been regarded as evidence of the contracting parties' intent that recovery should not be limited to damages for physical harm and resulting mental harm, but rather should encompass any kind of personal injury—including mental harm which does not stem from physical injury.[75]

Another issue faced by the courts is whether the treaty's provisions should be interpreted in light of the conditions in 1929, when the treaty was drafted, or in light of current conditions. One view suggests that a treaty should be interpreted with "regard to the context in which the agreement was made."[76] This procedure is followed in a number of decisions.[77] The opposite view has also had substantial support, both from commentators and in judicial decisions. This forward-looking interpretation[78] finds its clearest expression in cases such as *Reed v. Wiser*[79] and *Day v. Trans World Airlines.*[80] As the *Day* court noted, "conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787."[81] This analogy, of course, may be applied persuasively to treaty interpretation. "The plain meaning of the treaty must be adaptable to the practical exigencies of air travel in these parlous times."[82] Of course, for situations that were unanticipated when a treaty was drafted, "a prime canon of treaty construction is to look at the subsequent action of the parties."[83] Given these differing views in the particular circumstances of the Warsaw Convention, the question is which French legal meaning is binding: the one of 1929 or the present meaning? So far this question remains unanswered.

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75. *See supra* text accompanying note 73.

76. RESTATEMENT, *supra* note 46, § 147.

77. For example, the court in *Palagonia* looked at the French meaning of *lésion corporelle* at approximately the time the Warsaw Convention was signed. One of the documents examined was a writing dated 1930 by George Ripert, one of the drafters of the Warsaw Convention; another was a doctoral thesis supervised by Ripert, published in 1933.

78. R. MANKIEWICZ, THE LIABILITY REGIME OF THE INTERNATIONAL AIR CARRIER 22 (1981).

79. Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977).

80. Day v. TWA, 528 F.2d 31 (2d Cir. 1975).

81. *Id.* at 35.

82. *Id.*

83. "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." A. VERDROSS & B. SIMMA, *supra* note 30, at 396.

V. THE WARSAW CONVENTION AND ITS INTERPRETATION

The Warsaw Convention was signed by twenty-three countries in 1929.[84] Its provisions embody two main objectives: To provide uniform rules relating to air transportation, and to limit air carrier liability for accidents associated with air travel.[85] To achieve uniformity, the original signatories drafted the Warsaw Convention in French[86] and deposited a single copy with the Ministry of Foreign Affairs of Poland.[87]

Since the Convention was signed, however, commentators have expressed concern that diverging national judicial decisions have disrupted uniform application of the Convention.[88] The fact that the Warsaw Convention presently operates in diverse legal systems is one reason for this phenomenon.[89] This problem is particularly acute in common-law countries,[90] where the common-law meaning of a term may differ from its French civil-law meaning.

The United States was neither represented at, nor an original signatory of, the Warsaw Convention. The United States did not even adhere to the treaty until 1934.[91] An English translation of the treaty, provided by the Department of State, accompanied a copy of the original French version when the United States Senate debated and ratified the treaty. While United States courts have not expressly recognized this English version as controlling, this version has been used in a quasi-official manner in all considerations of the Warsaw Convention.[92] This creates problems because courts in the United States and other countries differ in the interpretative procedure of the Warsaw Convention. This is largely

84. With the exception of Great Britain (including British dominions), the original signatories were all civil-law countries. Warsaw Convention, *supra* note 1.

85. The maximum recovery for an air travel related accident was originally set by the Convention at 125,000 Poincaré Francs (about $8,300), subsequently increased to $75,000 by the Montreal Agreement (1966), and later to $100,000 by the Guatemala Protocol (1971) which has not yet been ratified by the United States. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 HARV. L. REV. 497 (1967).

86. At that time French was the predominant language in international relations.

87. Warsaw Convention, *supra* note 1, art. 36.

88. Mankiewicz, *Diversification of Uniform Private Law Conventions,* 21 INT'L & COMP. L.Q. 718, *passim* (1972).

89. *Id.* at 722. The Warsaw Convention also has certain "built-in" sources of disunification such as references to national and local law. *Id.* at 722.

90. To a certain degree these problems also arise among civil-law countries. *See* M. HILF, *supra* note 6, at 206-10.

91. *See* Warsaw Convention, *supra* note 1.

92. McKenry, *Judicial Jurisdiction Under the Warsaw Convention,* 29 J. AIR L. & COMM. 205, 207 (1963).

due to the absence of generally accepted international rules of treaty interpretation.

As previously discussed, the provisions of the Warsaw Convention resulted primarily from deliberations of jurists from civil-law countries.[93] Thus, the legal concepts used in the French text are necessarily civil-law concepts. United States courts have resorted to the English version in interpreting the Warsaw Convention because it is cumbersome to interpret foreign language documents.[94] Nonetheless, the doctrinally correct process is to seek guidance in the French original.

Under the Supremacy Clause of the United States Constitution,[95] the Warsaw Convention is the supreme law of the land[96] and thereby supersedes contrary state and local laws.[97] Because the United States did not become a signatory party to the Warsaw Convention until five years after its creation, the original French version was submitted for ratification to the Senate. This version was published in the Statutes at Large[98] as the official text of the Convention. Thus the Warsaw Convention has been adopted as the law of the land in its French version.[99] Consequently, when a term of the treaty is in dispute, the courts are required to take judicial notice of the original French version.[100]

Because official translations are generally accorded no interpretative value whatsoever,[101] there is a danger in deviating from the meaning of an original treaty text when an official translation provides the sole basis for interpreting the treaty. The following steps would resolve this problem.

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93. The text of the Warsaw Convention was the outcome of the international conferences held in Paris (1925) and Warsaw (1929) and the work of the *interim Commité International Technique d'Experts Juridiques Aériens* (*Citeja*). Lowenfeld & Mendelsohn, *supra* note 85, at 498.

94. The use of official translations for the convenience of the courts is a generally accepted practice. *See* Dölle, *supra* note 24.

95. U.S. CONST. art. VI, cl. 2.

96. *See, e.g.*, United States v. Pink, 315 U.S. 302 (1942); Todok v. Union State Bank, 281 U.S. 449 (1929); Smith v. Canadian Pac. Airways, 452 F.2d 798 (2d Cir. 1971).

97. In many countries, however, the courts are not held to the French texts, but apply the official translation which has the force of law because of its incorporation into a statute. The U.K. Carriage by Air Acts of 1932 and 1961, the German Air Transport Act of 1965, the Swiss Air Transport Regulation of 1952. R. MANKIEWICZ, *supra* note 7, at 194.

98. Warsaw Convention, *supra* note 1.

99. *See, e.g.*, Palagonia v. TWA, 442 N.Y. S.2d 670, 110 Misc. 2d 478 (1978).

100. Rosman v. TWA, 34 N.Y.2d 385, 392 (1974).

101. *See, e.g.*, cases mentioned in note 65 *supra*. It appears that the English translation used by the courts is a fairly accurate rendition of the French text. If there were any errors in the translation, they have since been removed. On the procedure of eliminating errors in an international treaty text, see A. ORAISON, L'ERREUR DANS LES TRAITÉS (1972); Vienna Convention, *supra* note 37, art. 79.

First, the accuracy of the translation itself must be ascertained. This can be done by comparing not only the language on a purely linguistic level, but also the legal connotations of the phrase(s) in dispute. Once it has been determined that a translation is accurate, courts can use this translation.[102] Because a translation is not the authoritative version in many cases, however, the legal meaning of language which is in dispute must be ascertained according to its civil-law usage. For example, in *Palagonia*, claims for personal injury and mental anguish were alleged to have arisen out of an air traffic accident. Since the Warsaw Convention allows recovery for the "wounding of a passenger or any other bodily injury,"[103] one of the issues in *Palagonia* was whether "bodily injury" included mental harm. Defendant produced as an expert a world renowned French linguist, professor of lexicology and semantics, and author of numerous books. Relying on certain dictionaries, the expert testified that "bodily injury" was an accurate translation of the French "*lésion corporelle*." However, this information did not dispose of the question whether the French legal meaning of "*lésion corporelle*" encompassed a connotation of mental harm.

To determine the existence of this connotation, the second step, that is an ascertainment of the legal meaning under civil-law usage, must be performed. To do this, a variety of means are available, including presentation of expert witnesses and examination of the French Civil Code, French legal treatises and legal dictionaries.[104] Courts should also look at the subsequent practice of the parties to the Convention, judicial decisions in other countries, and protocols and amendments of the Convention text. Frequently the history of a treaty, the *travaux préparatoires*, will be helpful.[105] All of these sources constitute supplementary means of interpretation. Thus, this process raises a further question as to what extent the rules of treaty interpretation allow for consultation of such outside sources and how, as a practical matter, courts resolve this question.[106]

Finally, it must be determined which version of the treaty is control-

102. 442 N.Y.S.2d 670.

103. Warsaw Convention, *supra* note 1, art. 17. The French version of Article 17 is "*blessure ou [. . .] toute autre lésion corporelle.*" *Id.*

104. In certain instances such attempts to ascertain the French legal meaning have been misconstrued as choice-of-law questions. *See, e.g.*, Rosman v. TWA, 34 N.Y.2d 385 (1974); Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238 (S.D.N.Y. 1975).

105. The term "*travaux préparatoires*" has been defined as "material constituting the development and negotiation of an agreement." RESTATEMENT, *supra* note 46, § 329, Reporter's Note 1.

106. *See supra* text accompanying notes 59-97.

ling when there is a discrepancy in the meaning of a term. According to the generally accepted rules regarding the authoritativeness of treaty texts, the French version should control in the event of either a linguistic or legal discrepancy. Unfortunately, the courts have not gone through this analytical process in interpreting the Warsaw Convention, and as will be illustrated below, there is some disagreement among the courts as to the resolution of this question.

VI. INTERPRETATION OF THE WARSAW CONVENTION BY UNITED STATES COURTS

In view of the analysis suggested above and the rules of interpretation presented, the cases interpreting the Warsaw Convention fall roughly into two main groups. The first consists of cases that essentially follow the rules laid down in *Block*. These cases go through all the steps of the analysis, that is, in cases of controversy the civil-law usage of the French legal term[107] is examined and given effect. The second group of cases departs from the *Block* approach for a variety of reasons.[108] The common element of the second group is that they all involve claims for mental anguish under Article 17 of the Warsaw Convention.[109] Therefore they raise the common question of whether the wording of Article 17 allowing recovery for "wounding and bodily injury" includes recovery for mental anguish.

A. *Rosman v. Trans World Airlines*

In 1974 the New York Court of Appeals decided *Rosman v. Trans World Airlines*.[110] The controversy in *Rosman* centered around the meaning of "bodily injury" and "wounding." Plaintiff contended that "bodily injury," or alternatively, "wounding" encompassed both physical and mental injury or harm. Thus the question arose as to whether a hearing to determine the French legal meaning would be appropriate.[111]

107. *See, e.g., Husserl I*, 351 F. Supp. 702 (S.D.N.Y. 1972); *Palagonia*, 442 N.Y.S.2d 670 (1978).

108. *See. e.g., Rosman*, 34 N.Y.2d 385 (1974); *Husserl II*, 388 F. Supp. 1238 (S.D.N.Y. 1975).

109. "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board." Warsaw Convention, *supra* note 1, art. 17.

110. Rosman was a consolidated action before the Court of Appeals of New York which issued a decision concerning both Rosman v. TWA, 338 N.Y.2d 664 (1972) and Herman v. TWA, 337 N.Y.S.2d 827 (1972).

111. New York CPLR 4511 requires that judicial notice be taken of laws of foreign coun-

The court denied a hearing on the ground that an accurate English translation of the Warsaw Convention had been agreed upon by the parties.[112] This translation presupposed that "bodily injury" was an accurate rendition of the French *"lésion corporelle,"* without further examining the connotations of each term. The opinion cites a number of cases which also declined to resort to such a hearing. The court then proceeded to examine the meaning of "bodily injury" in English by contrasting it to "mental injury." The court concluded that plaintiffs could recover damages for all palpable physical injuries, whether from mental or physical cause, and for mental damages resulting from bodily injury.

The opinion adopts the view of Section 146 of the Restatement[113] which states that the meaning intended by the parties is to be ascertained from the treaty's text, its context, and the circumstances of the treaty conclusion.[114] The Court ignores, however, that the text of the agreement is merely one of the factors to be considered and that the Restatement allows virtually any kind of relevant evidence to be considered.[115] Under the Restatement, such evidence may include a "comparison of the texts in the different languages in which the agreement was concluded, taking into account any provision in the agreement as to the authoritativeness of the different texts."[116] It has been suggested that the proper procedure to be followed is to comply with the Restatement's command regarding authoritativeness by applying the interpretative procedure to the French text rather than to the English translation.[117]

It is clear that the interpretative approach used in *Rosman* deviates from the venerable rule laid down in *Todok*.[118] Since the Supreme Court found an inquiry into the French legal meaning warranted, little justification appears for the deviation, notwithstanding the fact that an accurate translation had been reached. Inquiry into the French legal meaning can be justified, even under the Vienna Convention.[119] Under Article 33.2,[120] only authenticated versions are authoritative, and thus the court would be required to rely on the French text. Supplementary means of interpre-

tries if a party requests it and, in determining what law should be judicially noticed, allows a court to consider any testimony, document, information, or argument on the subject, whether offered by a party or discovered through its own research.

112. 34 N.Y.2d at 394-95.
113. *Id.* at 395, n.9.
114. RESTATEMENT, *supra* note 46, § 146.
115. *Id.*
116. *Id.* § 147(1) (i).
117. Note, *Rosman v. TWA*, INT'L LAW & POL. 87, 98 (1975).
118. Todok v. Union State Bank, 281 U.S. 449 (1929).
119. Vienna Convention, *supra* note 37.
120. *Id.* art. 33.2.

tation are allowed by Article 32(a) if the basic procedure enunciated in Article 31 "leaves the meaning ambiguous or obscure."[121] Of course, it is arguable that no dispute remains since the opinion quite clearly states that the parties agreed on the accuracy of the translation. On the other hand, the court also acknowledged that the parties "would attach different connotations to the terms."[122] This should be sufficient ambiguity within the meaning of Article 32 to demand recourse to supplementary sources.

The *Rosman* court also failed to look for guidance in the subsequent actions of the signatories. The Guatemala City Protocol had been signed three years before this decision and, although it was not ratified by the United States, as a subsequent action of the parties to the treaty, it constituted a valuable means of elucidating the intended meaning of the term.[123]

A possible explanation for the court's reluctance to inquire into the French legal meaning lies in the fact that it apparently failed to recognize this analysis as a supplementary means of interpretation. The court instead made certain allusions to choice-of-law questions.[124] Although it acknowledged that the question is not one of applying internal French law,[125] the court refused to "revert to a quest of past or present French law to be applied."[126] As the court noted "[i]t does not follow from the fact that the treaty is written in French, that in interpreting it we are forever chained to French law."[127]

It must be kept in mind that one of the two purposes of the Warsaw Convention was to achieve uniformity of the law relating to air transportation. This explains the "utter hostility which was displayed by the Conference relating to conflicts of laws solutions."[128] In fact, in the text of the Convention, the Conference expressly left only four instances to be governed by the law of the tribunal seized of the dispute.[129] With these limited exceptions, whenever the Warsaw Convention applies, its provi-

121. *Id.* arts. 31, 32(a).

122. 34 N.Y.2d at 394.

123. *See supra* note 83.

124. For a view that this is a choice-of-law question, see Note, *Block v. Air France,* 34 J. AIR L. & COMM. 643, 650 (1968).

125. 34 N.Y.2d at 394.

126. *Id.*

127. *Id.*

128. 386 F.2d at 330 (citing SUNDBERG, AIR CHARTER: A STUDY IN LEGAL DEVELOPMENT 261-62 (1961)).

129. These articles are 21, 25, 28(2) and 29. Verplaetse, *From Warsaw to the French Cour de Cassation: Article 25 of the Warsaw Convention,* 36 J. AIR L. & COMM. 50 (1970).

sions are the "law of the land" and no choice of law is involved.[130] Of course, in order to determine the proper meaning of the law of the land, the meaning of the original French version of the Warsaw Convention must be ascertained first.[131] It does not follow, as the *Rosman* court feared, that "we are forever chained to French law."[132] The question is merely one of considering the French legal usage as a supplementary means of interpretation.[133]

The interpretative procedure followed by the *Rosman* court is undoubtedly incorrect in light of the previously cited authorities.[134] It has been suggested that had the court recognized the French legal meaning as binding and examined the French usage of *"lésion corporelle"*[135] the final result would have been the same.[136] On the contrary, in light of later decisions[137] and comments[138] it is clear that correct interpretative procedure would have yielded the opposite result.

B. *Husserl v. Swiss Air Transport Co.*

The interpretative approach taken in *Rosman* was followed by the court in *Husserl v. Swiss Air Transport Co.*[139] In *Husserl*, plaintiff alleged that she had sustained both bodily injury and mental pain and anguish when she was detained on board defendant's airplane during a hijacking. Accordingly, she brought an action for damages. The case came before the court twice on summary judgment motions.

The court in *Husserl I* followed the interpretative approach enunci-

130. *See also* Mankiewicz, *Conflicting Interpretations of the Warsaw Air Transport Treaty*, 18 AM. J. COMP. L. 177, 178 (1970).

131. Burnett v. TWA, 368 F. Supp. 1152 (D.C.N.M. 1973).

132. 34 N.Y.2d at 395.

133. But the mere adoption of a language may in itself come very close to a choice of law. De Vries, *Choice of Language*, 3 VA. J. INT'L. L. 26 (1963). Under this theory it can be argued that the fact that the French text was meant to be controlling constitutes to a limited extent a choice of law.

134. *See* text accompanying notes 109-14.

135. One explanation given for the interpretative procedure followed by the Rosman court is the fact that the parties stipulated that "bodily injury" is the correct translation of *"lésion corporelle"* and a New York CPLR 4511 hearing would not be conducted unless one of the parties requested it. *See* R. MANKIEWICZ, *supra* note 78, at 193.

136. Note, *supra* note 117, at 105-06.

137. *See, e.g.*, Palagonia v. TWA, 442 N.Y.S.2d 679 (1978).

138. *See, e.g.*, Husserl I v. Swiss Air Transport, 351 F. Supp. 702 (S.D.N.Y. 1972). In the first motion defendants argued that hijacking was not an accident within the Warsaw Convention's liability provisions. The court dismissed the motion, holding that hijacking may be construed to be an accident within the meaning of the Warsaw Convention. For a discussion of the case, see generally Note, *Husserl v. Swiss Air*, 39 J. AIR L. & COMM. 445 (1973).

139. Husserl II v. Swiss Air Transport, 388 F. Supp. 1238 (S.D.N.Y. 1975).

ated in *Block*.[140] Recognizing the French legal meaning as binding, the court examined the French Text of Article 17 which was at issue in the case. A French legal dictionary indicated that the word *blessure* encompassed not only a physical wound, but also any other hurt or injury.[141] The court, however, held that the meaning of the word was controlled by the phrase which followed it — *toute autre lésion corporelle*. When analyzed in this context, the court concluded that mental anguish and suffering were not included within the provisions of the Warsaw Convention.[142] As further support for this position, the opinion noted that the English version of the Guatemala City Protocol substituted "personal injury" for the term "wounding and bodily injury" and left the French "*lésion corporelle*" unchanged.

The efforts made in Guatemala City to clarify the term "*lésion corporelle*" are noted by a leading authority in the field.[143] "On two occasions, namely at The Hague and in Guatemala City, eminent lawyers from French speaking civil law countries and English speaking common law countries agreed and affirmed . . . that the meaning of *lésion corporelle* in French civil law is the same as that of 'personal injury' in the common law and vice versa."[144]

Three years later, *Husserl* again came before the court (*Husserl II*).[145] Most likely under the influence of the *Rosman* decision, *Husserl II* adopted the opposite interpretative position. Conceding that the United States had adhered to the French text of the Convention, the court held that this did not mean that the French legal meaning of the words or the French legal interpretation of the treaty was binding.[146]

Husserl II challenged the authority of cases such as *Todok* and *Block*, whose holdings had been followed by all subsequent decisions, including *Rosman*.[147] The opinion argued that the "language was merely intended to express the common understanding of the drafters in a com-

140. 386 F.2d 323 (5th Cir. 1967).

141. The relevant part of the French version of Article 17 is *"blessure ou de toute autre lésion corporelle"*. The English translation of this language is: "or any other bodily injury suffered by a passenger." Warsaw Convention, *supra* note 1, art. 17.

142. 351 F. Supp. at 708.

143. R.H. Mankiewicz (for a description of his qualifications *see* 442 N.Y. S.2d at 672).

144. *Id.*

145. In this second summary judgment motion, defendants argued that mental anguish was not a compensable injury under Article 17 of the Warsaw Convention. The motion was denied.

146. 388 F. Supp. at 1249.

147. The *Rosman* court pays lip service to the rule of *Todok* and *Block* but concludes that there is "no suggestion in the treaty that French law was intended to govern the meaning of Warsaw's terms."

mon international language so that confusion would be limited and could be resolved to some extent by reference to the common meaning of one international language."[148] Subsequently, the court determined that the intent of the drafters was for the Warsaw Convention to apply to both physical and mental injuries. The court reasoned that had the drafters been aware of the ambiguity in the text, they would have clearly stated that the Convention applied to mental as well as physical injuries.[149] Based upon this analysis, the *Husserl II* court concluded that Article 17 includes mental as well as physical injuries.[150]

The approach taken by the *Husserl II* court can be criticized. If contracting states may freely substitute their own national interpretation of the Warsaw Convention for the original French text, the Convention's fundamental goal of uniformity in judicial interpretation of cases involving air transportation would be severely undermined. It has been suggested that *Husserl II* offends established principles of treaty interpretation under international law.[151] Indeed, the court ignored not only the methods of treaty interpretation prescribed by Articles 31 through 33 of the Vienna Convention, but also the principle that a party may not invoke the provisions of its national law to justify its failure to perform a treaty.[152] The Restatement of the Foreign Relations Law provides that,

> the duty of a state to give effect to the terms of an international agreement to which it is a party . . . is not affected by a provision of its domestic law that is in conflict with the agreement or by the absence of domestic law necessary for it to give effect to the terms of the agreement.[153]

Paradoxically, the court in *Husserl II* reached the correct result notwithstanding its reliance upon erroneous principles of treaty interpretation. *Husserl I* applied the correct principles of treaty interpretation, yet reached the wrong result.[154]

C. *Palagonia v. Trans World Airlines*

The court in *Palagonia v. Trans World Airlines* also considered the

148. *Id.*
149. *See* Note, *Husserl v. Swiss Air*, 7 SETON HALL L. REV. 108, 118 (1975).
150. 388 F. Supp. at 1253.
151. Note, *Husserl v. Swiss Air*, 6 GA. INT'L & COMP. L. REV. 339, 346 (1976).
152. Vienna Convention, *supra* note 37, art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
153. RESTATEMENT, *supra* note 46, § 140.
154. R. MANKIEWICZ, *supra* note 7, at 199.

meaning of Article 17 of the Warsaw Convention.[155] The claim in *Palagonia* also arose out of a hijacking incident on an international flight, and, as in *Rosman* and *Husserl I* and *II*, plaintiffs sought damages purely for mental agony. The issue again was whether the expression "bodily injury" encompassed a mental element and whether recovery should be allowed even in the absence of concomitant physical manifestations. Faced with conflicting interpretations of "bodily injury" in *Husserl I* and *Rosman* on the one hand, and *Husserl II* on the other, the *Palagonia* court followed the generally accepted principles of treaty interpretation and the rules laid down in *Block* and made an extensive inquiry into the French legal meaning of "*lésion corporelle.*"

Recognizing that the English version of the Warsaw Convention is only an unofficial translation[156] and not authoritative, the court stated that its inquiry was limited to the meaning of the French text.[157] The court concluded that the literal translation of "*lésion corporelle*" in the French text as "bodily injury" was not an accurate translation of the term as used in a French legal document.[158]

In ascertaining the French legal connotation, the court stated that the "French text was drafted primarily by experts who were used to working in concepts of the Civil Law, and it is necessary that phrases be examined for their meaning in the context of the legal usage."[159] This inquiry was effectuated by means of a hearing[160] which allowed the court to take judicial notice of relevant evidence at the parties' request. Testimony presented by plaintiff's witness, Professor Mankiewicz who, as a leading expert on the Warsaw Convention and Aviation Law, was recognized by the court as uniquely qualified to testify,[161] contributed substantially to the clarification of the expression at issue. Based on personal knowledge and experience as well as on writings by some of the drafters of the Warsaw Convention[162] dated shortly after it was signed, his testimony contributed substantially to the clarification of the expression at

155. 442 N.Y.S.2d 670 (1978).

156. "Unofficial" in the sense that this version is not adopted by the convention; however the court refers to what has been termed "official translation" for the purposes of this Note.

157. 442 N.Y.S.2d at 672.

158. *Id.* at 673.

159. *Id.* at 672-73.

160. CPLR 4511, *supra* note 112.

161. 442 N.Y.S.2d at 676. It should be noted that plaintiff's expert witness was well acquainted with the French language and the French law, particularly in the field of air law. While defendant's witness was equally an expert on the Warsaw Convention, the court found that he lacked "practical experience in either the study of or practice in French law or the French legal usage of technical terms."

162. *Id.* at 673.

issue. It was shown that *lésion corporelle*, as well as its German equivalent *Körperverletzung*, were understood to include mental injury in the legal usage of both countries.[163] This seems to be conclusive evidence as to both the drafters' intent and the French legal usage. Thus, the findings in this case implicitly give the solution the *Rosman* and *Husserl* courts sought. Presumably a hearing by the *Rosman* court would have yielded the same result.

VII. CONCLUSION

A review of the sequence of opinions discussed above raises the following questions. First, does Article 17 of the Warsaw Convention allow recovery for mental anguish alone, absent some physical consequences or an initial physical impact? Second, since two of the cases discussed[164] arrived at the same result using entirely different interpretative methods, what is the correct procedure to be followed by a court in this situation, and what arguments can be advanced in support of the view chosen?

To answer the first question, a look at the French law of damages is warranted. In French civil actions three types of damages are recoverable: 1) *Dommage matériel* allows recovery for damage to the *patrimoine, i.e.*, property and economic interests; 2) *dommage moral* covers fundamental rights outside the *patrimoine* such as honor and reputation, and 3) *dommage corporel* which overlaps with both the first and second categories and covers material and moral damages, such as moral suffering from loss of attractiveness due to permanent scars.[165] Thus, the common-law dichotomy of physical and mental injury is not necessarily valid under French law since *corporel* may include physical, moral, and mental elements.

The term "*lésion*" on the other hand, does not cause much controversy. The dictionary defines it as "injury, damage, prejudice or

163. *Id.* at 673-74.

164. *Palagonia*, 442 N.Y.S.2d 679 (1978) and *Husserl II*, 388 F.2d 1238 (S.D.N.Y. 1975).

165. *"L'antithèse classique est celle du dommage matériel et du dommage moral. Mais une troisième catégorie s'est aujourd'hui détachée des précédents: le dommage corporel, qui a des aspects à la fois matériels et moraux. [Le dommage corporel consiste] dans une atteinte à la santé ou à l'integrité physique [et comporte] à côté des préjudices matériels un préjudice moral."* J. CARBONNIER, DROIT CIVIL 306, 308 (1969). English translation: "The classical antithesis is that of material damage and moral damage. But nowadays a third category has emerged from the precedents: corporal damage, which has both material and moral aspects. [Corporal damage consists] of an invasion of health or physical integrity and [contains] besides these material harms also a moral harm."

wrong."[166] This broad definition justifies giving it both a concrete and an abstract interpretation. Thus, the French legal usage "*lésion corporelle*" could refer to mental suffering since it covers "any injury suffered by the plaintiff as a person distinct from any injury done to his patrimony, i.e., his belongings, economic assets or interests."[167]

Applied to the Warsaw Convention, one author states that "the use of the word 'lésion' after the words 'death or wounding' comprises and contemplates cases of traumatism or disturbance of the mind which do not immediately become manifest, but have a causal relationship with the accident."[168] French law has recognized this cause of action as far back as 1857.[169] Consequently, whether one adopts the view that the legal usage in 1929 or the present usage should govern, the French term "*lésion corporelle*" appears to encompass a mental element. Thus, Article 17 allows recovery for mental suffering alone. The fact that under French law aviation accidents are governed by contract law does not detract from this conclusion because damages for mental distress in contract cases are liberally allowed.[170]

While prior decisions in United States courts[171] have held that mental injuries alone were recoverable, these holdings were based on statutory construction of the English text of the Warsaw Convention.[172] *Palagonia* was the first decision to hold that mental injuries alone were recoverable on the ground that the correct translation of "*lésion corporelle*" is "personal injury" or "injury to the person," rather than "bodily injury" as originally construed by the courts.[173] Relying on the French legal usage to determine the accuracy of the translation,[174] the court concluded that the translation was incorrect, at least to the extent that "*lésion corporelle*" has a much broader meaning than would custom-

166. J. JERAUTE, VOCABULAIRE FRANÇAIS-ANGLAIS ET ANGLAIS-FRANÇAIS DE TERMES ET LOCUTIONS JURIDIQUES (1953).

167. *Id.* at 146. *See also* Miller, *Compensable Damages Under Article 17 of the Warsaw Convention*, 1 AIR L. 210, 211-13 (1976).

168. Mankiewicz, *supra* note 8, at 201 (quoting from the doctoral thesis of Yvonne J. Blanc-Dannery entitled *La Convention de Varsovie et les régies du transport aérien international*).

169. *Id.*

170. H. & L. MAZEAUD & A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE 413, 416 (1957).

171. Husserl II v. Swiss Air Transport, 388 F. Supp. 1238 (S.D.N.Y. 1975); Krystal v. British Overseas Airways, 403 F. Supp. 1322 (C.D. Cal. 1975).

172. Comment, *Palagonia v. TWA*, 4 AIR L. 102 (1979).

173. *Id.*

174. *Id.* The author of the cited article, attorney for plaintiff in *Palagonia*, notes that plaintiff was put on notice of the apparent improper translation by an article by Georgette Miller.

arily be attached to "bodily injury." In view of the authoritativeness of the text, the French legal meaning was recognized as binding.

Although the different interpretative procedures followed in *Palagonia* and *Husserl II* yielded the same result, it is quite conceivable that in other circumstances opposite results could occur.[175] Therefore, it is advisable that a uniform procedure be consistently followed. For the following reasons, the procedure adopted in *Palagonia* is most appropriate.[176]

First, the *Palagonia* approach is substantially in accordance with the rules of treaty interpretation. In litigation involving the Warsaw Convention, these rules would prohibit the use of the English translation as a sole basis of interpretation, since it is not an authentic text. Also, *Palagonia* allows a court to consult supplemental means of interpretation and in particular, to inquire into the French legal meaning of a term in dispute. Second, the Convention was negotiated and drafted by European jurists trained in civil law, in the language of a civil-law country. Nonetheless, United States courts are attempting to make civil-law terms fit common-law concepts. The potential problem of varying interpretations of the Warsaw Convention in different legal systems was not ignored by its drafters. By drafting the original in French, the drafters clearly intended for that version to be of the highest degree of authority. In this respect, the statement of the British representative[177] to the Warsaw Convention is particularly significant: "In several instances the draft is contrary to our laws and our customs, but we have decided to make sacrifices for the sake of this uniformity of rules."[178]

Finally, one of the primary purposes of the drafters of the Warsaw

175. One line of decisions predicates its analysis on the fact that the Warsaw Convention fails to create a cause of action. *See, e.g., Husserl II*, 388 F. Supp. 1238 (S.D.N.Y. 1975). Under this view the damages available would be based on conflicts-of-law rules and New York law provides an action for mental and psychosomatic injuries. The present analysis, however, is based on the premise that the Warsaw Convention supplies an independent cause of action. This view is supported by the holding in Benjamins v. BEA, 572 F.2d 913 (2d Cir. 1978). Therefore it is not necessary to look beyond the provisions of the treaty. For a thorough analysis of the cause of action question, see Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COMM. 217 (1959).

176. The opposite approach is not without support. *See, e.g.*, Schoner, *Die internationale Rechtsprechung zum Warschauer Abkommen in den Jahren 1974-76*, 26 ZEITSCHRIFT FÜR LUFT- UND WELTRAUMRECHT 256 (1977). While the author strongly supports the *Rosman* decision, he nonetheless advocates the idea that it is essential to ensure that the translation coincides with the original and the interpretation reached should certainly not be opposed to the French legal meaning. *Id.* at 260.

177. Sir Alfred Denis represented Great Britain, Australia and Canada at the Warsaw Convention.

178. R. MANKIEWICZ, *supra* note 78, at 199.

Convention was to ensure uniformity of rules regulating international air transportation. The French text drawn up in a single copy was adhered to by over one hundred countries and was clearly meant to control and thus to ensure harmonizing constructions by other signatory countries. If every signatory relied solely upon its own translation, as the *Rosman* and *Husserl* courts did, the number of differing interpretations generated would be equal to the number of members using these versions. This would obviously frustrate the drafters' intent by diluting or even destroying the purpose of the treaty.[179]

In view of the foregoing considerations, both theoretical and practical, in cases involving interpretation of the Warsaw Convention it is therefore desirable to employ the interpretative rules followed by the court in *Palagonia*.[180]

179. Note, *Reed v. Wiser*, 44 J. AIR L. & COMM. 175, 185 (1978). The practical significance of this concern is articulated in the FAA Administrator's statement before the Senate Foreign Relations Committee: "The Warsaw Convention, by providing a uniform rule of law which governs the relationship of the airline operator and his passenger or shipper . . . has for almost 40 years provided a degree of certainty making it possible for the individual passenger or shipper and the airline operator to be reasonably certain what their legal relationship is, and to act accordingly." 555 F.2d at 1091.

180. 442 N.Y.S.2d 670 (1978). This approach seems to be endorsed by the Supreme Court in its recent decision in Air France v. Saks, 105 S. Ct. 1338 (1985). There the Court, without undertaking a detailed examination of the principles involved in the interpretation of the Warsaw Convention, noted:

> To determine the meaning of [the] term accident in Article 17, we must consider the French legal meaning . . . because the Warsaw Convention was drafted in French by continental jurists . . . [and] because it is our responsibility to give the specific words of a treaty a meaning consistent with the shared expectations of the contracting parties.

105 S. Ct. at 1343.